Supreme Court, U.S.
FILED

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In The
UNITED STATES SUPREME COURT

No.

Jose Vasquez, (Agency No. 38-886-784)
Petitioner,

vs.

Alberto Gonzales, US Attorney General
Respondent.

On Petition For Writ of Certiorari
To The United States Court Of Appeals
For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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Jose Vasquez

QUESTION PRESENTED

The Petitioner is Jose Vasquez, a native and citizen of the Dominican Republic. The US Court of Appeals for the Third Circuit denied the Petitioner's petition for review of the adverse agency decision below, finding, ultimately, that the Petitioner is subject to removal from the United States.

In the proceedings before the Court of Appeals, the Petitioner asserted several grounds for challenging the Respondent's removal finding. The Petitioner asserted that the Respondent erred in rejecting his request for protection under the UN Convention Against Torture, and in rejecting Petitioner's assertion of US nationality. Further, Petitioner asserted that due to his work as an informant for official law enforcement entities in the United States, his removal to the Dominican Republic should be held in abeyance because the current threat to his life was solely on account of a danger created by the state.

The Court of Appeals determined that the Petitioner had failed to establish that it he would suffer torture at the hands of the Dominican government if returned to that country and determined that was not entitled to claim status as a national of the United States. Moreover, though the Court of Appeals acknowledged that the state may have an obligation to protect individuals likely to face harm as the direct result of state action, such a remedy it is not available to aliens subject to removal from the United States.

In these proceedings, the Petitioner pursues only his claim arising under the state created danger theory of law. Specifically, Petitioner asserts that inasmuch as he served as an informant for US law enforcement and that his life and safety have been placed in danger solely due to his role as an informant, and the government knew that he would face such danger as the result of his cooperation, the state created danger theory of law required that his removal from the United States be held in abeyance until such time as the danger he now faces abates. Additionally, Petitioner asserts that inasmuch as the Court of Appeals found that where the state created danger theory is implicated, the government has a constitutional obligation to protect the person in question from the threatened harm, the court can not permit the government to unilaterally disregard its constitutional obligations to the Petitioner simply because Congress failed to provide a remedy to him under the Immigration And Nationality Act where similarly situated US citizens can pursue such remedies.

Accordingly, Petitioner asserts that the Court of Appeals erred in its determination that the US government is excused from meeting its constitutional obligations arising under the state created danger theory where claims for protection are made by aliens subject to removal from the United States simply because Congress has not provided a remedy under immigration law was plain error. The finding of the Court of Appeals clearly violates the both the equal protection and due process provisions of the US constitution.

The question presented is:

Whether the US Court of Appeals for the Third Circuit erred in permitting the government to avoid meeting its constitutional obligation to protect the Petitioner from danger to his life arising solely due to his

work as an informant for US law enforcement simply because Congress has failed to provide an adequate remedy within US immigration law, where similarly situated US citizens are afforded such a remedy, no rational justification for the disparate treatment has been shown and the failure to provide a remedy serves as a violation of the Petitioner's right to due process of law and is in violation of the equal protection clause of the US Constitution?

PARTIES TO THE PROCEEDINGS

Petitioner is Jose Vasquez, an individual. Respondent is Alberto Gonzales, the Attorney General of the United States.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Jose Vasquez, respectfully petitions for a writ of *certiorari* to review the adverse decision issued below by the United States Court Of Appeals for the Third Circuit.

OPINION BELOW

The opinion of the Court of Appeals below on the original appeal is unreported.

JURISDICTION

The judgment of the Court of Appeals on the original appeal was entered on December 19, 2006. The jurisdiction of this court is invoked pursuant to 28 USC section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent provisions of the Immigration and Nationality Act, namely 8 USC section 1229(a)(3), as well as the due process and equal protection clauses of the United States Constitution are applicable to this appeal.

STATEMENT OF THE CASE

1. Legal Authority Below-

The Court of Appeals denied the Petitioner's claims arising under the state created danger legal theory upon the basis of its decision in *Kamara v. Attorney General*, 420 F.3d 202 (3rd Cir. 2005) The court asserted that although a "... 'state created danger exception' has been recognized under the law, such that the government has a constitutional obligation to protect a person against injuries inflicted by a third-party when it affirmatively places the person in a position of danger the person would not otherwise have faced...", (*Kamara* at page 216), the exception could not be applied to protect the Petitioner because he is an alien subject to removal. The Court asserted that since Congress has jurisdiction over immigration, and enacted removal statutes, namely the Immigration and Nationality Act, 8 USC section 1101, et. seq., without regard to the applicability of the state created danger theory, the exception could not be applied to protect aliens subject to removal.

8 USC section 1229(a)(3) provides that "(u)nless otherwise specified in (the Immigration and Nationality Act)..." removal proceedings are the "exclusive procedure" for determining whether an alien previously admitted to the United States can be removed from the United States.

2. Proceedings Below-

Petitioner, Jose Vasquez, by and through Counsel, Sandra Greene, Esquire, hereby petitions for a writ of certiorari following the dismissal of

his original appeal as presented to the US Court Of Appeals for the Third Circuit.

The Petitioner is a native and citizen of the Dominican Republic. The Respondent asserted in its notice to appear that the Petitioner entered the United States as an immigrant on or about October 1984. The Respondent further asserted that the Petitioner was convicted of conspiracy of possession to distribute cocaine on or about January 19, 2001 and that a sentence of 57 months was imposed. On the basis of those allegations, the Respondent charged the Petitioner with being removable as an aggravated felon and as a person in violation of a law relating to a controlled substance, INA sections 237(a)(2)(A)(iii) and 237(a)(2)(B)(i), respectively.

The Petitioner denied all charges of removal and asserted status as a national of the United States due to his having expressed allegiance to the United States prior to his conviction and for protection under the UN Convention Against Torture.

The Respondent denied the Petitioner's request to terminate proceedings, finding that the Petitioner was not a national of the United States. Subsequently, the Respondent permitted the Petitioner to submit an application for relief from removal pursuant to the UN Convention Against Torture. The Petitioner asserted fear of returning to the Dominican Republic due to the fact that he was an informant for US law enforcement authorities, specifically the FBI, regarding drug activities in the United States regarding a Mr. Paco Silva, Mr. Silva's family and his other associates. Petitioner testified that the individuals against whom he served as an informant were Dominican nationals.

During the removal proceedings, the Petitioner testified that he provided investigatory and law enforcement assistance to the FBI against

individuals named Papi, Michaelangelo and Caco Silva, all Dominican nationals who have resided in New York state and who have either been removed to the Dominican Republic or travel there frequently. The Petitioner testified that he will be tortured upon return to the Dominican Republic, by members of the Silva family and/or their associates, at the acquiescence of the Dominican government, due to the high levels of corruption within the Dominican government and the family's well connected relationships with Dominican authorities.

Further, the Petitioner testified that he was contacted by the FBI to provide assistance to the agency regarding criminal activity of Dominicans residing in the United States. The Petitioner testified that the focus of the intended investigation was the Silva family and their associates.

The Petitioner testified that he was first threatened due to his cooperation with the government in 1998 as the Silva family suspected that he might be an informant. Due to the situation emerging in the United States, the Petitioner asserted that he absconded on his criminal bond and fled to the Dominican Republic in 1998. The Petitioner asserted that while in the Dominican Republic the Silva family made numerous threats against him, the threats being made directly to various members of the Petitioner's family. The Petitioner also testified that on one occasion, five police officers and another individual went to the home of the Petitioner's brother in search of the Petitioner. The Petitioner asserted in his testimony that members of the Silva family are wealthy and well connected individuals who have threatened to use their connections with the Dominican authorities to facilitate their efforts to kill or harm the Petitioner.

The Respondent denied the Petitioner's application for relief finding

the Petitioner's testimony lacked credibility and finding that the Petitioner failed to meet his burden of proof on the issue of whether it was more likely than not that he would be tortured upon return to the Dominican Republic because of corruption in the Dominican Republic and his service as an informant. The decision of the Board of Immigration Appeals was entered on or about March 7, 2005.

The Petitioner then filed a petition for habeas corpus with the US District Court for the Eastern District Of Pennsylvania, seeking review of the Board's decision. Prior to final adjudication of the habeas action, the appeal was transferred to this court pursuant to the provisions of the Real ID Act.

On or about December 19, 2006, the Petitioner's appeal before the Court of Appeals, docket 05-3510, was denied as the court determined that the Petitioner had established that he was a national of the United States, that he had not met the burden of proof required to show that he would, more likely than not be tortured upon return to the Dominican Republic, and that the state created danger legal theory was not applicable to aliens subject to removal from the United States.

Reasons For Granting the Petition

The question presented challenges the finding of the Court of Appeals that remedies related to the state created danger legal theory are unavailable to aliens subject to removal from the United States. The decision of the Court of Appeals raises serious constitutional issues as it results in violations of both the equal protection clause and the due process clause of the US Constitution. The decision of the Court of Appeals offers no reasonable rationale for the disparate treatment accorded

to US citizens versus aliens regarding the applicability and enforcement of the government's obligations arising under the state created danger theory. Further, the decision fails to address why the court deferred to Congress's plenary powers regarding immigration matters, under the circumstances presented, where Congress clearly had self serving reasons for failing to provide remedies to aliens seeking protection under the state created danger theory, the Petitioner has been left without an adequate remedy and the Court's determination permits the violation of the Petitioner's constitutional right to due process and the guarantees of equal protection under the law.

It should be noted at the outset that the Court of Appeals recognized the validity of the state created danger theory of law and does not refute the Petitioner's assertion that remedies are available to individuals harmed by state action. Though the court stated that, in general, "...the state has no obligation to protect individuals from harm inflicted by third parties..." [citing *DeShaney v. Winnebago County Department of Social Services*, 489 US 189 195, 109 S.Ct. 998, 103 L.Ed. 2d 249 (1989)], it admitted that "a state created danger exception" has been recognized and is available to some individuals. [See, Dec. 19, 2006 decision at page 9]

Moreover, other federal courts have required the Respondent to hold an alien's removal in abeyance upon the showing of a state created danger where the alien has been found to be eligible to enforce the state created danger exception. [See, *Builes v. Nye*, No. 02-420 (US District Court for the Middle District of Pennsylvania, January 2, 2003 253 F. Supp. 2d 818 ; See also, *Rosciano v. Sonchik*, (US District Court for the District of Arizona, 2002).]

The Petitioner has asserted that solely due to his provision of assistance to US law enforcement as an informant, there now exists a genuine an opportunity for harm to befall Petitioner upon return to the

Dominican Republic and, thus, a state created danger exists. [See, *Builes v. Nye*, 239 F.Supp. 2d 518 (MD Pa. 2003)] Thus, Petitioner asserts that he has presented proper justification for his assertion of eligibility to enforce the state created danger exception.

Citing its decision in *Kamara v. Attorney General* (supra), the Court of Appeals asserted disagreement with the Petitioner's assertion of eligibility to enforce the exception. Though the Court of Appeals held that where an individual is threatened with harm where the state affirmatively exposes the person to harm that he would not ordinarily have risked, the state has a constitutional obligation to protect the person against such harm. It determined, however, that due to Congress' plenary powers over immigration matters this exception could not be enforced by aliens subject to removal from the United States.

In reaching that finding, the court stated it could not enforce this exception in the cases of aliens subject to removal because it : "...would impermissibly tread upon the Congress' virtually exclusive domain over immigration, and would unduly expand the contours of our immigration statutes and regulations, including the regulations implementing the [Convention Against Torture] (hereinafter CAT)..." [id at pages 9-10, citing *Kamara* at pages 217-218] Ultimately, the court asserted that: "Based on this precedent, we reject Vasquez's claim for relief under the state-created danger exception." [See, December 19, 2006 decision at page 10]

The Petitioner asserts that the decision of the Court of Appeals is plain error and the instant petition for certiorari should be granted. First, though it is true that Congress has plenary power regarding immigration matters, Congress' enforcement of such powers by unconstitutional means is not entitled to deference by federal courts. In *INS v. Chada*, 462 US 919, 940-941 (1983), this court determined that litigants are entitled to challenge whether Congressional action is in accord with constitutional requirements. It is a well established principle of statutory construction

that statutes must be interpreted in a manner sufficient to avoid serious constitutional questions. [See, *Zadvydas v. Davis*, 533 US 678, (2001)]

While it is true that Congress has plenary powers regarding immigration matters, acknowledgment of those powers does not require federal courts to defer to Congressional action where to do so results in the violation of established constitutional protections. The determination of the Court of Appeals violates this rule of statutory construction cited above as it results in violations of both the equal protection and due process rights guaranteed to aliens subject to removal. Equal protection issues are raised because the court's interpretation of both the state created danger exception and the parameters of Congress' plenary power over immigration provides no rational explanation as to why US citizens placed in danger by the government should be afforded protection from such harm but aliens subject to removal, similarly placed in harm, have no actionable remedy.

That aliens subject to removal have enforceable rights under the equal protection provisions of the US Constitution is clear. This court has determined that where Congress seeks to afford different treatment to aliens and citizens who are similarly situated, there must be a rational basis for the distinction. [See, *Matthews v. Diaz*, 426 US 67 (1975)] Here, the Court of Appeals postulated no rational basis for the disparate treatment between aliens subject to removal and US citizens seeking to enforce the state created danger exception other than the assertion that Congress has chosen not to provide such a remedy within the Immigration and Nationality Act. Thus, the equal protection violations that arise in view of the decision of the Court of Appeals is clear and its extension of deference to the plenary powers of Congress in this instance was constitutionally prohibited.

Similarly, the decision of the Court of Appeals also results in the violation of the due process provisions of the US Constitution. Again, it

is clear that aliens subject to removal are entitled to due process of law. [See, *Matthews v. Eldridge*, 424 US 319 (1976)] As regards the applicability of the state created danger exception federal courts have recognized an alien's claim of entitlement to enforce the exception as one relating to issues relating to substantive due process. [See, *Bulies v. Nye* 253 F. Supp. 2d 818 (US District Court MD of Pennsylvania March 23, 2003)] That analysis appears to be appropriate as the state created danger theory attempts to remedy a violation of an individual's substantive due process rights by examining whether there has been a "'...deprivation of liberty" triggering the protections of the Due Process Clause." [See, *Kneipp v. Tedder*, 95 F.3d 1199, 1205 (3rd Cir. 1996)] The District Court in *Bulies* rejected the Respondent's request for re-evaluation of the substantive due process claims raised by the alien in that case. [See *Builes* II (supra),] Thus, the due process rights implicated through an alien's assertion of the right to seek protection pursuant to the state created danger exception are plain. Further, this court has noted that if Congressional action is interpreted so literally that the results are absurd due to a blind focus on literalness such that constitutional violations develop, the interpretation is "tyrannical" and clearly incorrect. [See, *US v. Witkovich*, 355 US 194, 199 (1952)]

Third, while it is true that the remedy Petitioner seeks does not exist within the Act, the fact that Congress, as a governmental entity, has a self dealing motivation for not providing for such a remedy in its legislation can not be overlooked. Though the Court of Appeals asserted that the enforcement of the state created danger exception for aliens subject to removal would invade Congress' plenary powers over immigration, and impact statutes regarding the Convention Against Torture, the truth is that such statutes would be wholly unaffected by the enforcement of the state created danger exception.

The statutes enacted regarding the Convention Against Torture involve torture to be inflicted upon an alien while in official custody, after

removal from the United States, by a foreign power or with that power's acquiescence. The state created danger exception, on the other hand, becomes enforceable solely on the basis of the conduct of authorities in the United States. Though it requires proof of future harm, it does not require proof that the feared harm would come at the hands of a foreign government or with that government's acquiescence while in official custody. Accordingly, inasmuch as the legal elements required to establish eligibility for CAT bear no similarity to the elements necessary to enforce the state created danger exception, the analysis of the Court of Appeals was flawed.

Moreover, the assertion of the Court of Appeals that permitting aliens subject to removal to enforce the state created danger exception will tread on Congress' plenary powers is without foundation. Enforcement of the exception only requires that a removal order against an alien placed in danger by governmental action be held in abeyance while the danger exists, it does not, in any way, require that the government be prohibited from placing such an individual into removal proceedings or from rendering a finding that the alien is subject to removal. Stated differently, the removal procedures enacted in the Immigration and Nationality Act will in no way impeded or otherwise evaded through enforcement of the state created danger exception. Enforcement of the exception would operate only as long as the feared danger exists, as determined by a designated adjudicator. Just as an individual granted protection under CAT remains subject to removal pursuant to the order of removal issued against him, with actual removal held in abeyance until the threat of torture passes and is carried out, pursuant to the protections afforded under international and domestic law, when the stated danger passes, the relief requested by the Petitioner would operate in the same manner.

Therefore, an alien seeking to enforce the state created danger exception is essentially and actually similarly situated to a successful CAT applicant in that enforcement of the exception does not require that his

removal be prohibited entirely, but merely that it be held in abeyance until such time as the noted danger passes. Though the state created danger exception arises under domestic law and the protections afforded under CAT arise pursuant to international and domestic law, both classes of aliens are, for all important purposes similarly situated. Thus, inasmuch as statutes, regulations and procedures already exist under the Immigration and Nationality Act and the Code of Federal Regulations to both complete removal proceedings AND defer removal of aliens whose removal would subject them to danger in their home countries, it can not be argued with any genuine sincerity that permitting aliens subject to removal to enforce the state created danger exception treads on Congress' plenary powers regarding immigration.

The existing statutory scheme makes it clear that it is possible to render a final administrative determination that an alien is removable, but also hold the removal in abeyance due to a clear and present danger currently facing the alien in his home country. In view of this reality, and in view of the clear constitutional obligations arising under the state created danger exception where it is found to be applicable in a specific alien's case, there is no justifiable or rational reason why Congress has not provided a remedy for aliens such as the Petitioner in the Immigration and Nationality Act. The only apparent explanation as to why Congress has not provided the aforementioned remedy is the intent to evade governmental accountability for constitutional violations implicated by the state created danger exception and to circumvent the ability to aliens subject to removal to enforce their constitutional protections guaranteed pursuant to the exception.

It should be noted when the three part test announced by this court in *Matthews v. Eldridge (supra)* for the evaluation of the constitutional sufficiency of an immigration policy is applied to the rationale of the Court of Appeals, the flaws in the decision are patently apparent. First, the Petitioner's interest in the application of protections in addition to

those that currently exist is high given the asserted danger to his life. Second, the danger that the Petitioner will be harmed under the current scheme is high as it makes no provision of any remedy for the constitutional remedies the Court of Appeals has found exist where the state created danger exception is applicable and the value of providing such protection through additional relief is high. Third, the government's interest in avoiding additional burdens in adopting new procedures is low because, as outlined above, it already provides the remedy the Petitioner seeks in the Immigration and Nationality Act and Code of Federal Regulations for individuals granted protection under the provisions of CAT.

Thus, in view of the constitutional violations addressed above, the decision of the Court of Appeals to extend deference to Congress and absolve it from the obligation to provide a remedy to the Petitioner and those aliens similarly situated to himself, where the court would require a remedy if Petitioner were a US citizen, was without justification and the requested writ of certiorari should be granted.

Conclusion

WHEREFORE, for all the aforementioned reasons, Petitioner respectfully asks that his petition for writ of certiorari be GRANTED.

Sincerely,
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Appendix A
US Department of Justice
Decision of the Immigration Judge
Executive Office For Immigration Review

Falls Church, Virginia 22041

File: A38-886-784 Date: March 7, 2005
In re: *F-Vasquez, Jose Antonio

IN REMOVAL PROCEEDINGS

APPEAL
ON BEHALF OF RESPONDENT: Greene, Sandra

ORDER:

PER CURIAM: The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. See, 8 C.F.R. Section 1003.1(e)(4).

Frederick D. Hess

For the Board

Appendix B NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 05-3510

JOSE VASQUEZ,
Petitioner

v.

ATTORNEY GENERAL OF THE UNITED STATES,
Respondent.
On Petition for Review of an Order of the United States Department of Justice
Board of Immigration Appeals
BIA No. A38-886-784
(Honorable Grace A. Sease, Immigration Judge)
Submitted Pursuant to Third Circuit LAR 34.1(a)
December 12, 2006

Before: FUENTES, and VAN ANTWERPEN, Circuit Judges, and PADOVA,* District Judge

(Filed: December 19, 2006)

OPINION OF THE COURT

* The Honorable John R. Padova, District Judge of the Eastern District of Pennsylvania, sitting by designation.

VAN ANTWERPEN, Circuit Judge.

Petitioner Jose Vasquez, a native and citizen of the Dominican Republic, seeks review of the March 7, 2005, Order of the Board of Immigration Appeals ("BIA") that affirmed without opinion the Immigration Judge's ("IJ") denial of his application for relief. We have jurisdiction to review the petition pursuant to 8 USC section 1252(a), and for the reasons set forth below, we will deny the petition.

I.

Because we write solely for the benefit of the parties, we will set forth only those facts necessary to our analysis.

Vasquez was admitted to the United States as an immigrant in 1984. In 1998, he was arrested after taking possession of five kilograms of sham cocaine from an undercover officer. Shortly after being released on bail, Vasquez fled to the Dominican Republic, where he stayed for approximately two years. In May 2000, just before his $200,000 bond was to be forfeited, he returned to the U.S. and turned himself in to authorities. In January 2001, he pled guilty in federal court to conspiracy to possess with intent to distribute cocaine and was sentenced to 57 months in prison. In April 2004, the Immigration and Naturalization Service issued a Notice to Appear charging Vasquez with being subject to removal from the United States based upon his conviction of an aggravated felony, as defined under the Immigration and Nationality Act, and his conviction of a violation of a controlled substance law. In July 2004, the Bureau of Immigration and Customs Enforcement took Vasquez into Custody.

Vasquez filed applications for asylum, withholding of removal, and

relief under the Convention Against Torture. In October 2004, at a hearing on the merits of his applications, Vasquez testified that he feared being tortured if he were to be sent back to the Dominican Republic. He explained that he had been an informant for the Federal Bureau of Investigation (FBI) after being arrested in 1998, and that he had agreed to testify against Miguel Angelo Silva and Paco Silva, the brothers for whom Vasquez was to unknowingly transport the five kilograms of cocaine. He further testified that he fled to his brother's house in the Dominican Republic in 1998 because of threats made against his life in connection with his agreement to cooperate with authorities. Vasquez also stated that, in 1999 or 2000, his cousin saw Paco Silva and five police officers search for Vasquez at Vasquez's home in the Dominican Republic. Because of this incident and Paco Silva's wealth and connections with the police, Vasquez fears being killed or tortured should he be returned to the Dominican Republic.

The IJ who presided over the hearing found Vasquez removable as charged. She denied his applications for asylum and withholding of removal after finding the Vasquez's drug conviction was a "particularly serious crime" under 8 USC section 1158(b)(2)(A)(ii) (stating that the Attorney General may deny withholding of removal to a petitioner who has "been convicted by a final judgment of a particularly serious crime"). She also denied Vasquez's petition for withholding pursuant to the Convention Against Torture. Overall, she did not find that Vasquez's story has sufficient indicia of credibility. He presented no evidence supporting his claims that he had cooperated with the FBI, was working for the Silva brothers at the time of his arrest, or had been threatened by the Silva brothers. He also produced no evidence supporting his claims that Paco Silva and five police officers had visited his home in the Dominican Republic. Finally, the IJ found that Vasquez's credibility

was harmed by his fleeing the country and remaining a fugitive of the law for nearly two years.

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The BIA affirmed the IJ's decision without opinion in March 2005. Vasquez, through counsel, filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Pennsylvania challenging the IJ's and BIA's decisions. The District Court stayed Vasquez's removal, and transferred the petition to this Court to be treated as a petition for review under the Real ID Act of 2005, Pub.L.109-13.

II.

In his petition for review, Vasquez challenges the removal decision on three grounds. First, he claims the IJ committed legal error in applying and interpreting the US Attorney General's decision in *Matter of Y-L-,A-G-,R-S-R*, 23 I&N Dec. 270, 2002 WL 358818 (A.G. 2002) and analyzing his torture claim. Second, he claims he is not subject to removal because he is a national of the United States. Finally, he asserts his removal is barred by the "state created danger exception."

A. The Torture Claim

Vasquez asserts the IJ erred in interpreting *Matter of Y-L-,A-G-,R-S-R*, as an absolute bar to any and all torture claims from Dominican nationals. Because of this flawed interpretation, he claims the IJ did not appropriately consider evidence that shows it is more likely than not that Vasquez will be tortured upon his return.

"When the BIA affirms an IJ without opinion, we review the IJ's opinion..." *Butt v. Gonzales*, 429 F.3d 430, 433 (3rd Cir. 2005) (internal quotation marks and citation omitted). We review the opinion under the substantial evidence standard. See *Zubeda v. Ashcroft*, 333 F.3d 463, 471 (3rd Cir. 2003). Under this standard, the decision must be

affirmed if it is "supported by reasonable, substantial and probative evidence on

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the record considered as a whole." *Balasubramanrim v. INS*, 143 F.3d 157, 161 (3rd Cir. 1998) (quoting *INS v. Elias-Zacarias*, 502 US 478, 481, 112 S.Ct. 812, 117 L.Ed.2d 38 (1992)). Furthermore, the IJ's findings must be upheld "unless the evidence not only supports a contrary conclusion, but compels it." *Abdille v. Ashcroft*, 242 F.3d 477, 484 (3d Cir. 2001).

To establish a claim for protection under the Convention Against Torture, the applicant must meet a two-part test. First, it must be "more likely than not" that he will be tortured if removed to the proposed country. 8 CFR section 208.16(c)(2). And second, the feared torture must be inflicted "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." 8 CFR section 208.18(a)(1). In assessing the probability of the applicant being tortured, the following factors are relevant: (1) "evidence of past torture inflicted upon the applicant:" (2) "evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured;" and (3) "evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable." 8 CFR section 208.16(c)(3)(i)-(iii). " The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration." 8 CFR section 208.16(c)(2).

Vasquez asserts the IJ read the Attorney General's decision in *Matter of Y-L-,A-G-, R-S-R* as suggesting that "no one from the Dominican Republic can ever establish a claim for protection under the UN Convention Against Torture." Vasquez's Brief at 30. *Matter of Y-L,A-G-,R-S-R*, analyzes, among other things, whether drug crimes constitute "particularly serious crimes" for the purpose of the Immigration and Nationality Act. Coincidentally, *Matter of Y-L,A-G-,R-S-R* involved a petitioner very similar to Vasquez: a Dominican national who had pled guilty to a federal drug charge, served

as an informant to federal agents, and petitioned for asylum, withholding of removal and Convention Against Torture protection. In her

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discussion of Vasquez's petitions, the IJ cited *Matter of Y-L,A-G-,R-S-R* a total of three times and always in connection with Vasquez's petition for asylum and withholding of removal under the Immigration and Nationality Act. She relied on the case to support her conclusion that Vasquez's drug trafficking offense constituted a "particularly serious crime: and that his applications for asylum and withholding of removal should be denied. In her analysis of Vasquez's Convention Against Torture Application, the IJ neither cited nor relied upon *Matter of Y-L,A-G-,R-S-R* as an absolute bar to his Convention Against Torture petition without merit.

Vasquez also asserts the IJ did not appropriately consider his Convention Against Torture petition. Specfically, he claims the IJ based her adverse credibility finding exclusively on her perception that Vasquez did not not his fear of torture until the day of the hearing. In addition, Vasquez claims the IJ did not consider his personal circumstances or the Department of State's Country Report on the Dominican Republic in determining the likelihood of his being tortured.

Even though the IJ may have erred in finding that Vasquez first noted his fear of torture minutes before his hearing, we find the evidence in the record sufficient to support the IJ's ultimate determination. In supporting her finding that Vasquez lacked credibility, the IJ noted the following: (1) a lack of any mention in Vasquez's pre-sentence investigation report of the Silva brothers (despite the inclusion in the report of the names of other co-conspirators); (2)Vasquez's history as a fugitive; (3) Vasquez's failure to produce any evidence supporting his claim that he had been an informant for the FBI; and (4) Vasquez's failure to produce any evidence corroborating his testimony that he had been threatened or that Paco Silva had visited Vasquez's Dominican home. Overall, we find that substantial evidence supports the IJ's credibility finding.

Furthermore, we agree with the IJ that Vasquez did not support his claim that it is "more likely than not" that he will be tortured with the

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acquiescence of a public official if he returns to the Dominican Republic. First, there is no evidence of past torture. Vasquez lived in the Dominican Republic for two years following his cooperating with federal agents and was not harmed.[1] Second, Vasquez presented no evidence that he will likely be tortured if he returns. He claims he will be tortured in a Dominican prison because he is a deportee form the United States. He points to no specific evidence, however, that shows Dominican deportees from the U.S. are often imprisoned and tortured because of their status as deportees. Finally, he offers little evidence that the government would acquiesce to his torture. The only support he provides for this assertion is an unverified account from his cousin that police accompanied Paco Silva to Vasquez's house and his own belief that the Silva brothers can bribe police officials. Overall, Vasquez did not meet his burden of proving that he is " more likely than not" to be tortured with the acquiescence of a public official if he is returned to his native land.

B. Vasquez as a "National"

Vasquez claims he is not subject to removal because he is a "national of the United States. As a result, he asserts the Executive Office For Immigration Review has no jurisdiction under the Immigration and Nationality Act to order his removal.

Because this Court considered and rejected Vasquez's claim that he is a national in an earlier appeal, we need not reconsider it. See *Vasquez v. Immigration and Customs Enforcement*, 160 Fed. Appx. 199,

[1]We find it curious that, when Vasquez's life was threatened in 1998 by the Silvas, he thought it safer to live in the Dominican Republic with his brother than remain in the U.S.

2005 WL 3481523 (3rd Cir. 2005)(finding "Vasquez...is not a national.")

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C. "The State Created Danger Exception"

Finally, Vasquez argues the U.S. government has an affirmative duty to protect him because the risk of his being tortured arises from the assistance he provided to federal agents.

Generally, the state has no obligation to protect individuals from harm inflicted by third parties. See *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 195, 109 S.Ct. 998, 103 L.Ed. 2d 249 (1989). However, as this Court explained in *Kamara v. Attorney General*, "we have recognized a 'state created danger exception,' such that the government has a constitutional duty to protect a person against injuries inflicted by a third-party when it affirmatively places the person in a position of danger the person would not otherwise have faced." 420 F.3d 202, 216 (3d Cir. 2005).

Despite Vasquez's contentions, *Kamara* explicitly declined to recognize the state created danger exception in the immigration context. This Court determined that extending the exception in this way, "would impermissibly tread upon the Congress' virtually exclusive domain over immigration, and would unduly expand the contours of our immigration statutes and regulations, including the regulations implementing the [Convention Against Torture]." Id. At 217-18. Based on this precedent, we reject Vasquez's claim for relief under the state-created danger exception.

III.

We have considered all other argument made by the parties on appeal, and conclude that no further discussion is necessary. For the foregoing reasons, we conclude that substantial evidence supports the IJ's denial of Vasquez's petition and will deny the petition for review.